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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 103

SWIFT & COMPANY,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

EDWARD R. JOHNSTON,
ALBERT E. JENNER, JR.,
EDWARD H. HATTON,
Attorneys for Petitioner.

WILLIAM N. STRACK,
THOMAS H. LONG,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered on May 8, 1951, dismissing petitioner's complaint.

Opinions Below

The Emergency Court of Appeals did not file a written opinion.

Jurisdiction

The judgment of the Emergency Court of Appeals was entered May 8, 1951 (R. 156). The jurisdiction of this Court is invoked pursuant to Section 204 (d) of the Emergency Price Control Act of 1942 as amended (56 Stat. 23,

31; 50 U. S. C. App. 924 (d)), making applicable Section 240 of the Judicial Code as amended (now, 28 U. S. C. 1254).

Questions Presented

1. Whether respondent's Announcement No. 1 is invalid as being unauthorized by and inconsistent with "Livestock Slaughter Payments Regulation No. 10, Reconstruction Finance Corporation," under which the Announcement purported to be issued, by which Announcement respondent seeks to invalidate and recapture livestock slaughter subsidies paid to or claimed by petitioner for livestock slaughtered while price controls were in effect solely by reason of the fact that petitioner sold the commodities derived from such slaughter after the termination of price controls?

2. Whether the conversion formula devised by respondent (Form DSC-118) which requires petitioner to determine the amount of meat inventory on hand at the termination of price controls, to compute the approximate weight of livestock from which slaughter the meat was derived, and then the amount of livestock slaughter subsidies allocable thereto, is invalid?

3. Whether respondent's Announcement No. 1 is invalid as retroactively impairing petitioner's vested rights to accrued livestock slaughter subsidies in contravention of the Fifth Amendment to the Constitution of the United States?

Statutes, Regulation, Directive and Announcement Involved

The pertinent provisions of the Emergency Price Control Act of 1942, and the applicable directives, regulations, and Announcement No. 1 are set forth in the appendix to this petition.

Statement

Petitioner instituted this action by filing its complaint on January 31, 1951, with the United States Emergency Court

of Appeals (R. 7-36), seeking review of respondent's invalidation of livestock slaughter subsidy claims filed by petitioner for livestock slaughtered from September 1 to October 14, 1946, as to which meat inventory remained on hand on the termination of price controls on livestock and commodities processed therefrom on October 15, 1946[1] (R. 5-6).

Respondent's answer to petitioner's complaint admitted all of the essential allegations of fact contained in the complaint (R. 37-40). Respondent also filed a motion for a judgment on the pleadings (R. 42-43). Briefs were filed by the parties R. 47-48; 50-140; 145-155). On May 8, 1951, the Emergency Court denied petitioner's motion for oral argument (R. 155), and granted respondent's motion for a judgment on the pleadings (R. 156). The following statement of the facts consists of the factual admissions of respondent, as well as a brief review of the livestock slaughter subsidy program.

The Livestock Slaughter Subsidy Program

The program was based on Section 2(e) of the Emergency Price Control Act (50 U. S. C. App. 902(e)) which provided that "Whenever the Administrator determines that the

[1] Prior to filing its complaint in the Emergency Court of Appeals, petitioner filed suit on June 30, 1947 in the District Court for the Northern District of Illinois, Eastern Division pursuant to Section 2(m) of the Emergency Price Control Act, to challenge the livestock slaughter recapture program. The District Court held that it had jurisdiction, and also found Announcement No. 1 and the subsidy recapture program to be unauthorized and invalid (*Swift & Co.* v. *R.F.C.*, 79 F. Supp. 546; 81 F. Supp. 629). Respondent appealed to the Court of Appeals for the Seventh Circuit and obtained a reversal on the sole ground that the District Court did not have jurisdiction, because, in its view of the case, petitioner was attacking the validity of an "order" or "regulation" issued under Section 2 of the Price Control Act, over which the Emergency Court of Appeals had exclusive jurisdiction. (*R.F.C.* v. *Swift & Co.*, 183 F. 2d 456). The Court of Appeals did not reach the merits of the case. This Court denied petitioner's Petition for a Writ of Certiorari from the judgment of the Court of Appeals. (340 U. S. 878). Petitioner instituted the present proceedings after the denial of its Petition for a Writ of Certiorari, by filing a protest with respondent (R. 1-5).

maximum necessary *production* is not being obtained or may not be obtained during the ensuing year, he may * * * make subsidy payments to domestic *producers* of such commodity * * * to obtain the necessary *production* thereof." (Emphasis supplied.)

The livestock slaughter subsidy program was initiated on June 7, 1943 by Regulation No. 3 of the Defense Supplies Corporation (8 F. R. 10826), in response to the "hold-the-line order" of the President (E. O. 9328, 8 F. R. 4681), which resulted in a reduction by 10% of ceiling prices on meats derived from the slaughter of livestock at both the retail and wholesale levels. The Director of Economic Stabilization determined that the roll-back should not result in the payment of lower prices for livestock sold by the producer to the slaughterer. Accordingly, Defense Supplies Corporation was authorized to pay to livestock slaughterers a subsidy approximating the 10% roll-back, so that the slaughterer in turn would be able to pass back the subsidy payment benefits to the producers without a proportionate reduction in prices for the livestock purchased.

The Director of Economic Stabilization issued a new and comprehensive directive on October 25, 1943 (8 F. R. 14,641, App., Pet. 20-22), to supplement the admittedly inadequate controls over the prices at which the producer sold livestock to the slaughterer, and in particular to implement enforcement of the requirement that the payment benefits of the livestock slaughterer subsidy be passed back to the producer. This directive is the keystone of the livestock stabilization program, and is the basic directive insofar as the case at bar is concerned. The directive recited that it was designed to insure "(a) That the livestock slaughter payments made with respect to cattle under Regulation 3 of Defense Supplies Corporation * * * inure to the benefit of cattle producers"; "(b) That such payments are made only to the extent necessary to maintain live cattle prices within a range consistent with the purposes of the stabiliza-

tion and production programs"; "(c) To insure the maximum production of cattle"; and (d) to make certain "That available supplies of live cattle are equitably distributed among slaughterers and feeders." (8 F. R. 14,641.)[2]

The statement of consideration issued in connection with the October 25, 1943 directive (Office of War Information Release 2652) contained the following apt description of the subsidy program:

> "Since May 2, 1942, beef prices have been subject to control at wholesale and retail. On December 16, 1942, uniform dollars-and-cents prices were established by zones throughout the country for beef carcasses and wholesale cuts. Based upon these regionally uniform wholesale prices, uniform dollars-and-cents retail prices were established in May, 1943. As part of the Government's program for reducing the cost of living to the general level of September 15, 1942, the wholesale and retail prices of beef were reduced by approximately 10 per cent in June of 1943. *In order that this reduction might not threaten the production of live stock by unduly reducing the return to the producer, the price reduction was accompanied by the institution of an equalized payment to slaughterers, enabling them to continue to pay the same* prices for live cattle." (Emphasis supplied.)
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>
> *"The Director has considered the possibility of establishing both price ceilings and support prices for live cattle. The present directive, while avoiding the disadvantages of a formal price regulation or support price program, seeks to accomplish the purpose of both.* This it does by requiring deductions from subsidy payments in the case of any slaughterer whose monthly payments for live cattle are either above or below the range of prices provided for in the directive." (Emphasis supplied.)

[2] Subsequent directives (amendments and extensions) extended the program to other livestock; namely, sheep, lambs, hogs, pigs and calves.

Announcement No. 1

On March 31, 1947, five and one-half months after the termination of the livestock slaughter subsidy program on October 15, 1946, and three months after respondent's declaration that Regulation No. 10 had expired, October 15, 1946, respondent abruptly and without notice, issued its "Announcement No. 1 under Regulation No. 10" (R. 14; App., Pet. 23-4). Respondent thereby sought to disallow unpaid subsidy claims and to recover subsidy payments theretofore made on slaughter operations as to which meat inventory remained on hand on October 15, 1946.

Under date of April 29, 1947, respondent issued an implementing letter directed to subsidy claimants (R. 15, 23-30A). The form (DSC.-118) prescribed by respondent required the use of an artificial formula prescribed by respondent to attempt to reconstruct what the slaughterer's meat inventory might have been on October 15, 1946. On the basis of the supposed meat inventory thus calculated, an additional artificial formula was required to be applied to reconstruct the live weight livestock equivalent thereof, and from that, the subsidy payments which were to be recaptured. Petitioner shortly thereafter instituted proceedings in the District Court (See f. n. 1, p. 3 supra).

Reasons for Granting the Writ

The Emergency Court of Appeals, in Affirming the Validity of Respondent's Announcement No. 1 and the Livestock Slaughter Subsidy Program Thereby Sought to Be Authorized, Erroneously Decided Federal Questions of General Importance Which Have Not Been But Should Be Reviewed by This Court.

The Emergency Court of Appeals, in denying petitioner's motion for oral argument and in granting respondent's motion for a judgment on the pleadings, placed sole reliance

on a prior decision of that Court in *Schluderberg-Kurdle Co.* v. *R.F.C.*, 169 F. 2d 419 (E.C.A., 1948). In so doing the Emergency Court of Appeals erroneously decided federal questions of critical importance to the packing industry, failed to give effect to respondent's Livestock Slaughter Payments Regulation No. 10 and the controlling directives of the Office of Economic Stabilization and its successor agencies, misapprehended the history, mechanics and purpose of the livestock slaughter subsidy program, and reached a conclusion contrary in principle to decisions reached by it in subsidy cases subsequent to the *Schluderberg-Kurdle Co.* case.

I

Announcement No. 1 is unauthorized by and inconsistent with the letter and spirit of respondent's Livestock Slaughter Payments Regulation No. 10 and the Directives Pursuant to the Command of Which the Regulation Was Promulgated.

1. Livestock Slaughter Payments Regulation No. 10 was issued effective September 1, 1946 and terminated effective October 15, 1946 with the removal of stabilization controls on livestock and commodities processed therefrom on that date. Regulation No. 10 incorporated by reference the provisions of respondent's Livestock Slaughter Payments Regulation No. 3, revised, which was in effect up to and including June 30, 1946 when it terminated on the temporary expiration of the Emergency Price Control Act of 1942, as amended. Regulation No. 10 set forth in detail all conditions to which a subsidy applicant must conform before it was entitled to obtain the subsidy benefits provided by the regulation. None of the recited conditions of payment of livestock slaughter subsidies contained in Regulation No. 10 provided for the recapture or invalidation of subsidies due and owing on livestock slaughter by reason of the fact that

the commodities processed therefrom might be sold at a time when price controls might not be in effect. The admitted fact that no such express condition existed in the Regulation, when coupled with the careful recitation of the conditions of payment contained in the Regulation, requires the conclusion that respondent, by its Announcement No. 1, was seeking to import a non-resistant condition of payment into its own livestock slaughter subsidy regulations. Respondent, by reason of this fact, was forced to adopt the position that although the condition of payment which it sought to import into the Regulation was not expressly set forth, nonetheless it was "inherent" in the livestock slaughter subsidy program. The Emergency Court in the Schluderberg-Kurdle Co. case, accepted this argument. Yet, the Emergency Court in decisions subsequent to its decision in the *Schluderberg-Kurdle Co.* case, has expressly held that it will not read "inherent" conditions into subsidy regulations including the very regulations involved in the case at bar. See e.g. *Gibbs* v. *R.F.C.*, 169 F. 2d 654 (E.C.A., 1948); *Belle City Packing Co.* v. *R. F. C.*, 169 F. 2d 413 (E. C. A. 1948); and *Consolidated Flour Milling Co.* v. *R.F.C.*, 177 F. 2d 206 (E.C.A., 1949). There thus exists a clear conflict in principle between the decision of the Emergency Court in the *Schluderberg-Kurdle Co.* case (as well as the case at bar), and the three subsequent decisions of that Court above cited.

We think it readily evident that livestock slaughterers subject to respondent's livestock slaughter payment regulations should be entitled to rely upon the unequivocal and express language of these regulations. They should not be required to determine eligibility for livestock slaughter subsidy payments by hypothesis and guesswork as to what the payment agency might some time in the future decide

was an "inherent" condition subsequent on the payment of these subsidies.

2. Up until the publication of Announcement No. 1, respondent had never asserted the existence of the condition of payment recited in the Announcement. Indeed, its consistent administrative practice had been exactly to the contrary.

Thus, when the Emergency Price Control Act of 1942, as amended, expired on June 30, 1946, all livestock stabilization controls expired as well as price and related controls on the sale of livestock and commodities processed therefrom. Of course, the commodities derived from livestock slaughtered up to and including June 30, 1946, were sold during the period July 1, 1946-September 1, 1946 at uncontrolled prices. Yet, respondent not only did not seek to invalidate or recapture livestock slaughter subsidies, but expressly and affirmatively "announced" that it would honor and pay all livestock slaughter subsidy claims for livestock actually slaughtered up to and including June 30, 1946. Respondent, on the reinstitution of controls effective September 1, 1946, commenced the payment of livestock slaughter subsidies for all livestock slaughtered on and after that date. It made no payments (nor were any claims filed) by reason of processed meat inventory on hand on September 1, 1946 (which had been derived from the slaughter of livestock purchased during the period of decontrol, at prices substantially higher than controlled prices).

Similarly, on the final termination of controls October 15, 1946, respondent honored all of petitioner's claims for livestock actually slaughtered up to and including that date with the exception of $221,861.51, and a portion of these claims were for the slaughter of livestock the inventory derived from which was sold at uncontrolled prices and which was a fact known to respondent when it honored these

claims. It was five and one-half months after the termination of controls that respondent, by its Announcement No. 1, first claimed a right to invalidate and recapture livestock slaughter subsidies otherwise due and owing, to the extent that meat inventory derived from the slaughter of such livestock had been sold on and after October 15, 1946 at uncontrolled prices.

3. Not only is Announcement No. 1 without support in Regulation No. 10, and contrary as well to the prior consistent administrative treatment by respondent of the livestock slaughter subsidy program, but it is also contrary to the purpose and intent of the livestock slaughter subsidy program.

The livestock slaughter subsidy in its operation and effect was a producer's subsidy. It was not a meat subsidy payable to the consumer, but was a producer's subsidy payable to the livestock slaughterer on condition that he pass back the benefits of the subsidy to the producer by purchasing the livestock within the established price ranges. Thus the livestock slaughterer represented the conduit by which the livestock producer directly obtained the benefits of the subsidy, and the regulation reflected this intention by expressly stating that as a condition of payment, the livestock slaughterer must have passed back to the producer the benefits derived from the subsidy. Regulation No. 10 was cast solely in terms of livestock slaughter, and the amount of the subsidy was determined by the live weight of the livestock slaughtered. In all respects, respondent's own regulation establishes that although the subsidy for administrative reasons, was paid to the slaughterer of livestock, the benefits of the subsidy had already been passed back to the producer when the slaughterer had purchased the livestock from the producer within the established range of prices. The termination section of the Regulation is in

complete accord with this purpose and intent, reflects the fact that the subsidy was earned and payable on the slaughter of the livestock, and is directly contrary to Announcement No. 1. It reads as follows:

> "Such termination shall not preclude the filing of claims on account of livestock slaughtered on or before the date of termination" [i. e.,October 15, 1946].

4. Respondent, as the sole ground for statutory support for Announcement No. 1, recited in that document that such support was to be found in Section 6(a)(4) of the Price Control Extension Act of 1946.

Not only can no support be found for the Announcement in this section of the statute, but that section is in full accord with Petitioner's argument. Section 6(a)(4) merely stated that subsidy "operations" should not be carried out under authority of that Act with respect to any commodity, "during which maximum prices on such commodity are not in effect under the Emergency Price Control Act of 1942, as amended." Of course the term "operations" used in Section 6(a)(4) means the purchase and slaughter of livestock as is recognized in Section 6(d) of that Act. The legislative history of the Price Control Extension Act of 1946 reflected the intention of Congress that inventories should be built up so as to speed the decontrol of all commodities, and that subsidies, including the livestock slaughter subsidies, should be paid for that purpose. The livestock slaughter subsidies here involved were employed to build up inventories pursuant to this Congressional command. It was never contemplated by Congress that Section 6(a)(4) should ever be construed to prohibit the building up of inventories. It was intended only by Congress to prohibit the payment of livestock slaughter subsidies on livestock slaughtered on and after October 15, 1946, when price controls were removed from livestock and commodities processed therefrom.

5. The decision of the Emergency Court of Appeals in the *Schluderberg-Kurdle Co.* case conflicts in principle with subsequent decisions of that Court refusing to read "inherent" conditions into the express conditions of the subsidy regulations, and because: the subsidy claimant in the *Schluderberg-Kurdle Co.* case not only conceded but actually argued that the subsidy was a consumer's meat subsidy rather than a producer's subsidy; the Emergency Court set forth this concession in its opinion and regarded it as being of decisive significance; the controlling directives were not called to the attention of the Court; the significant administrative interpretations of the program were not called to the attention of the Court; and the termination section of the Regulation was not considered in its proper light.

II

Form DSC-118 is arbitrary and capricious and is not authorized by law. No reasonably accurate determination can be made either of terminal inventory on hand or of the live weight animal equivalent thereof from any records kept in ordinary course of business or required to be kept by the livestock slaughter payments regulation.

Form DSC-118 was devised by respondent to implement Announcement No. 1. The form is predicated on the assumption that actual inventory of meat or meat products processed therefrom as of any date in the midst of a regular accounting period can be determined by a subsidy claimant from records kept in the ordinary course of business. It is further assumed that a conversion factor (figure), supplied by respondent and required to be employed by the subsidy claimant, when applied to the claimant's actual or theoretical meat inventory, will result in the theoretical live weight equivalent of the animals from the slaughter of which the

meat and meat products reported in the form are assumed to have resulted.

Actual or book inventories of meats on hand or in process from day to day are not and cannot be maintained in the ordinary course of business. In the case of petitioner, actual inventories are taken but twice a year and then only after careful planning and preliminary preparation. On the basis of the semi-annual actual inventories, monthly accounting and inventory periods are employed with estimated or running inventory calculations on the last day of each month. Petitioner has 46 packing plants and 276 branch selling houses. The food and food products which it derives from the slaughter of livestock are constantly being processed, fabricated, stored and moved from unit to unit and plant to plant.

It is alleged in the complaint and admitted in the answer, that because October 14, 1946 fell in the middle of a monthly accounting period "no accurate or complete inventory for that day was or is or can be made available, prepared, computed or constructed." Even in the case of the taking of a so-called actual or count inventory, the meat or meat products on hand cannot be precisely determined at any given time because in some products, such as sausage, for example, the percentage of meat varies from batch to batch and, in any event, loses its identity in the finished product. Thus no reasonably accurate determination (based on factors determinable from records usually kept in ordinary course of business by the industry) of the livestock live weight equivalent of meat inventory on hand at 12:01 A.M., October 14, 1946, can be computed by use of Form DSC-118 because (a) actual meat inventory on hand as of that date cannot be determined, particularly as to processed items such as sausage, pickles, etc.; and (b) even if it could be determined or fairly calculated, it could

not be converted by any mere formula into livestock live weight equivalent because the formula assumes some average or arbitrary over-all yield, where actual yield varies from one livestock lot to another and the meat inventory cannot be traced back to particular lots.

III

Announcement No. 1 retroactively impaired vested rights of petitioner to accrued livestock slaughter subsidy payments in violation of the Fifth Amendment to the Constitution of the United States.

It has been recognized both legislatively as well as judicially that livestock slaughter subsidies are "obligations," not "gratuities." Section 6(d), Price Control Extension Act of 1946; *Illinois Packing Co.* v. *Snyder,* 151 F. 2d 337, 339 (E.C.A., 1945); *Armour & Co.* v. *R.F.C.,* 162 F. 2d 918 (E.C.A., 1947). Petitioner slaughtered livestock in compliance with all of the conditions and provisions of Livestock Slaughter Payments Regulation No. 10. It had thus fulfilled all of the qualifications and conditions imposed by Regulation No. 10 upon its termination on October 15, 1946. Respondent, by its Announcement No. 1, is now seeking retroactively to forfeit certain subsidy claims which petitioner had already become entitled to and earned prior to the promulgation of the Announcement. This is in contravention of the Fifth Amendment to the Constitution of the United States. Judicial authority has long recognized that such rights arising under subsidy statutes cannot be thus retroactively invalidated. See, *e.g., Steamship Co.* v. *Joliffe,* 2 Wall. (69 U.S.) 450, 457-8; *Ettor* v. *Tacoma,* 228 U.S. 148; *Coombes* v. *Getz,* 285 U.S. 434; *Salt Co.* v. *East Saginaw,* 13 U.S. 372; *Calder* v. *Henderson,* 54 Fed. 802, 804-5 (C.A. 5, 1893).

Conclusion

For the reasons stated, it is respectfully submitted that the general importance of the issues here involved fully merits review by this Court. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

EDWARD R. JOHNSTON,
ALBERT E. JENNER, JR.,
EDWARD H. HATTON,
Attorneys for Petitioner.

WILLIAM N. STRACK,
THOMAS H. LONG,
Of Counsel.

APPENDIX

I

The pertinent provisions of Section 2(e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U.S.C. App. 902(e)), provides as follows:

> "Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d * * *."

The pertinent provisions of Section 6(a)(4) of the Price Control Extension Act of 1946 (60 Stat. 664, 671) provide as follows:

> "Sec. 6(a) The last paragraph of section 2(e) of the Emergency Price Control Act of 1942, as amended

by the Stabilization Extension Act of 1944, shall not apply with respect to operations for the fiscal year ending June 30, 1947, of the Commodity Credit Corporation and the Reconstruction Finance Corporation: *Provided,* That with respect to such corporations and such operations, the making of subsidy payments and buying for resale at a loss shall be limited as follows:

Payments and purchases may be made with respect to operations for the fiscal year ending June 30, 1947, which involve subsidies and anticipated losses as follows:

"(4) With respect to noncrop programs, 1946 crop program operations and the 1947 crop program operations relating to sugar, flour, petroleum, petroleum products, and other domestic and imported materials and commodities, $869,000,000: *Provided,* That the operations authorized under this subparagraph (4) shall be progressively reduced, shall be terminated not later than April 1, 1947, and shall not cost more than $629,000,000 during the last six months of the calendar year 1946. Operations shall not be carried out under authority of this subparagraph (4) with respect to any commodity for any period occurring after the date of the enactment of this Act during which maximum prices on such commodity are not in effect under the Emergency Price Control Act of 1942, as amended, or the Stabilization Act of 1942, as amended: *Provided,* That subsidies with respect to petroleum produced from stripper wells shall be continued at not to exceed the existing rates. No subsidy or purchase and sale operation shall be undertaken under authority of this subparagraph (4) with respect to any commodity unless a subsidy or purchase and sale operation with respect to such commodity was in effect on June 29, 1946; and no such operation shall be undertaken under authority of this subparagraph (4) which will increase the rate of subsidy paid or the rate of loss incurred with respect to any commodity above that which would be paid or incurred if the operations in effect on June 29, 1946, had been continued on the same basis."

II

The Directive of October 25, 1943 (8 F.R. 14,641) reads as follows:

"§ 4004.1 Livestock slaughter payments. (a) The purposes of this section are to insure:

(1) That the livestock slaughter payments made with respect to cattle under Part 7003 of this title (Livestock Slaughter Payments) inure to the benefit of cattle producers;

(2) That such payments are made only to the extent necessary to maintain live cattle prices within a range consistent with the purposes of the stabilization and production programs;

(3) That such prices do not impose undue hardship upon any group of slaughterers whose output is needed to obtain the maximum necessary production; and

(4) That the available supplies of live cattle are equitably distributed among slaughterers and feeders.

(b) It is hereby determined that the stabilization and production programs require the maintenance of live cattle prices within the following ranges:

Grade:	Price (per cwt., at Chicago)
Choice	$15.00 to $16.00
Good	14.25 to 15.25
Medium	12.00 to 13.00
Common	10.00 to 11.00
Cutter and canner	7.45 to 8.45

"The Price Administrator and the War Food Administrator are directed to determine and publish, and to certify to Defense Supplies Corporation, live cattle prices at points other than Chicago which are in line with the foregoing Chicago prices.

(c) There shall be deducted from the livestock slaughter payments hereafter made to any slaughterer under Part 7003 of this title the net amount, if any, by which the total of the prices paid by such slaughterer for all live cattle purchased during the month for which

the payments are made either fell short of the total amount he would have paid at the lower of the applicable prices, or exceeded the total amount he would have paid at the higher of the applicable prices, set forth or provided for in paragraph (b) of this section.

The grade of live animals purchased by a slaughterer shall be determined on the basis of the carcass grade. The Price Administrator and the War Food Administrator are directed to determine and publish, and to certify to Defense Supplies Corporation, conversion factors for determining the dressed weight equivalents of live weights.

In the case of slaughterers who operate more than one plant, the amount of the payments and deductions to be made shall be determined separately for each plant.

(d) The livestock slaughter payments hereafter made with respect to cattle under Part 7003 of this title to any slaughterer whose beef carcasses are graded by an official grader of the Food Distribution Administration shall be revised and computed on a grade basis as follows:

Grade:	Payments per live cwt.
Choice	$1.00
Good	1.45
Medium	.90
Common	.50
Cutter and Canner	.50
Bologna Bull	.50

Livestock slaughter payments made to slaughterers whose beef carcasses are not graded by an official grader of the Food Distribution Administration shall remain unchanged.

(e) Slaughterers who during the year 1942, or a representative portion thereof, sold and who currently sell 98% or more of the total dressed carcass weight of cattle slaughtered by them in the form of carcasses,

wholesale cuts, frozen boneless beef (Army specifications) (carcass equivalent) or ground beef, shall be paid in addition to the payments authorized by Part 7003 of this title, the amount of $0.80 per cwt. of cattle slaughtered during the month for which such payments are made.

(f) Defense Supplies Corporation is directed to amend Part 7003 of this title in accordance with this section.

(g) The War Food Administrator is directed as soon as practicable to institute a system of allocation of live cattle to slaughterers and feeders which is adequate to maintain an equitable distribution of available supplies.

(h) The Secretary of Commerce is directed to determine on the basis of facts certified by the War Food Administration and the Office of Price Administration whether the effectuation of the expressed purposes of this directive require adjustments in, or additions to, the payments contemplated by this directive because of inequities resulting from differences in transportation costs.

(i) This directive shall become effective immediately, except that paragraphs (c) and (d) shall become effective on December 1, 1943, and payments under paragraph (e) shall be made with respect to cattle slaughtered on and after November 1, 1943.''

III

'''Livestock Slaughter Payments Regulation No. 10, Reconstruction Finance Corporation''' reads as follows:

'''Section 7010.1. Reconstruction Finance Corporation shall make payments to eligible slaughterers on cattle, calves, hogs and pigs slaughtered on and after September 1, 1946, in accordance with all the terms and conditions of Livestock Slaughter Payments, Revised Regulation No. 3 or Reconstruction Finance Corporation, as amended by Amendments Nos. 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.

Section 7010.2. Revised Regulation No. 3 Reconstruction Finance Corporation and Amendments Nos. 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 thereto are made a part of this regulation.

Section 7010.3. This regulation shall terminate automatically without regard to the ten day notice provision of Section 7003.12 of Revised Regulation No. 3, on the failure of any condition required by law as a prerequisite to validity of a subsidy on livestock or meat.

This regulation shall become effective September 1, 1946. Issued this 28th day of August, 1946.

STUART K. BARNES,
Executive Director, Office of Defense Supplies."'

IV

"Announcement No. 1 Under Regulation No. 10 of Reconstruction Finance Corporation" reads as follows:

"The volume of meat held in inventories by slaughterers at the close of business on October 14, 1946 (the date of termination of price controls on meat) was substantial, and such inventories were, of course, sold thereafter at uncontrolled prices. The Office of Temporary Controls has determined that in view of the provisions of Section 6(a)(4) of the Price Control Extension Act of 1946 and in order to avoid unjust enrichment of packers at the expense of the Government, subsidies allocable to these inventories should be recaptured. Operation of the plan is as follows:

I. De Minimis Cases. Because of the disportionate administrative burden in relation to the potential amounts involved the Government will not attempt to recapture such subsidies in the case of slaughterers who furnish information to the RFC showing that they did not slaughter in excess of 500,000 pounds total live weight of cattle, calves and

hogs, combined during the period consisting of the May, June and September 1946 accounting periods. A form for the use of slaughterers falling in this class is attached hereto (RFC Form No. DSC 117). Such slaughterers must complete and file this form with RFC before April 30, 1947, unless they elect to have invalidated their September and October 1946 meat subsidy claims whether paid or unpaid. On receipt of the completed form showing slaughter of not more than a total of 500,000 pounds live weight of cattle, calves and hogs combined during the period consisting of the May, June and September 1946 accounting periods, RFC will pay any amounts otherwise due on the September and October 1946 claims.

II. Large Slaughterers. With respect to slaughterers who slaughtered in excess of 50,000 pounds during the May-June-September period the amount to be recaptured will be based on the amount of meat held in inventory at the close of business October 14, 1946, unless they elect to settle instead by foregoing their total subsidies for September and October 1946. A form to be used by such slaughterers in reporting their inventories or for the purpose of making this election will be furnished as soon as copies are available. Until the form is available, no further September and October subsidy payments can be made to any slaughterers in this category unless he had no inventory of meat or meat products at the close of business October 14, 1946.

With respect to all slaughterers, large or small, who have already received the September-October subsidy, if their cases are not settled pursuant to the procedures provided herein, they will be referred to the Department of Justice.

Issued this 31st day of March, 1947.

STUART K. BARNES,
Executive Director, Office of Defense Supplies."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 103

SWIFT AND COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The Emergency Court of Appeals wrote no opinion. Its *per curiam* judgment dismissing the complaint (R. 156) is not reported.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on May 8, 1951 (R. 156). The petition for a writ of certiorari was filed on June 7, 1951. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price

Control Act of 1942, as amended (56 Stat. 23, 31, 50 U.S.C. App. 924(d)), making applicable Section 240 of the Judicial Code, as amended (now 28 U.S.C. 1254).

QUESTION PRESENTED

Whether the Emergency Court of Appeals, on the authority of its prior decision in *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation,* 169 F. 2d 419, certiorari denied, 335 U. S. 846, properly dismissed the complaint, which challenged the legality of respondent's refusal to pay subsidies on meat which was produced from livestock slaughtered while price controls were in effect but which was sold after such controls were removed.

STATUTE, REGULATIONS AND DIRECTIVES INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901 *et seq.*) and of the controlling regulations and directives are set forth in the Appendix to the Brief in Opposition in *Cudahy Packing Company* v. *Reconstruction Finance Corporation,* October Term 1951, No. 104, to which reference is respectfully made.

STATEMENT

This is a companion case to *Cudahy Packing Company* v. *Reconstruction Finance Corporation,* (No. 104, this Term), presenting the same issues and based on an almost identical statement of facts.

The instant suit was instituted by a complaint filed January 31, 1951, in the United States Emergency Court of Appeals, seeking review of respondent's denial of petitioner's subsidy claims for meat slaughtered from September 1 through October 14, 1946, but remaining in petitioner's terminal inventory for sale at uncontrolled prices after the end of meat price controls on October 15, 1946 (R. 7-36).

Petitioner filed subsidy claims for livestock slaughtered by it during the period September 1 through September 28, 1946; these claims were paid in full by respondent. Subsequently, petitioner filed claims for livestock slaughtered by it during the period September 29 through October 14, 1946, in the aggregate amount of $596,765.05. Respondent paid claims totaling $374,903.54 but withheld the balance of $221,861.51 as representing subsidies claimed for meat slaughtered during the above period but on hand as inventories on October 14, 1946, and sold on the uncontrolled market after October 14, 1946. Petitioner, on December 13, 1950, filed a protest demanding of respondent subsidy payments for its October 14, 1946, inventory (R. 1-5). The protest was denied by respondent on January 2, 1951 (R. 5-6).

Like Schluderberg-Kurdle and Cudahy, petitioner, in the Emergency Court of Appeals, primarily assailed the validity of Announcement No. 1 under Regulation 10 and demanded that respond-

ent pay those subsidies on its terminal inventory. It also attacked Form DSC-118, which was prescribed for use in determining the terminal inventories of slaughterers for inventory exclusion and recapture purposes, as being arbitrary and capricious and not authorized by law (R. 7-36). Respondent filed a motion for judgment on the pleadings (R. 42-43), alleging, *inter alia,* that the complaint set forth no material issue of fact and failed to state a claim upon which relief can be granted against respondent. The Emergency Court of Appeals sustained respondent's motion in this and the companion case of *Cudahy* v. *Reconstruction Finance Corporation.* In almost identical judgments rendered May 8, 1951, the court dismissed the complaint in each case upon the authority of its prior decision in *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation,* 169 F. 2d 419, certiorari denied, 335 U. S. 846.

ARGUMENT

This case presents the same issues, with the exception of one discussed below, and is based on an almost identical statement of facts as its companion case, *Cudahy Packing Company* v. *Reconstruction Finance Corporation, supra.* Respondent has discussed these issues in its briefs in opposition to certiorari in both the *Cudahy* case[1] and the

[1] Both the petition for a writ of certiorari by Swift & Company and that by Cudahy Packing Company were filed with the Clerk of the Supreme Court on the same day, June 7, 1951. Although the docket number for the petition of Swift & Com-

Schluderberg-Kurdle Co. case, and, for the reasons there stated, respectfully submits that the petition here also should be denied.

The only new issue raised by petitioner in the instant case is an attack on Form DSC-118, which was prescribed for use in determining the terminal inventories of slaughterers for inventory exclusion and recapture purposes, as being arbitrary, capricious, and not authorized by law. Petitioner's attack is clearly insubstantial and fails to sustain the petitioner's burden of showing by clear and convincing evidence that the form was arbitrary, capricious, or contrary to law.

The burden is upon petitioner, as any other meat subsidy claimant, to establish the items upon which it is entitled to subsidy, and if petitioner cannot show the part of its product upon which Congress authorized the subsidy to be paid, petitioner thereby precludes itself from effective subsidy claim. Section 7003.4 (b)[2] required petitioner to keep, *inter alia,* accurate records which furnish complete information in support of each claim. Under the provisions of Form DSC-118, petitioner could show its actual book or record inventories as of 12:01 A.M. October 15, 1946, or could—as

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pany is 103 and for Cudahy Packing Company is 104, the petition by Cudahy was served on respondent on June 20, 1951, while the petition by Swift was served on respondent on June 25, 1951.

[2] Revised Regulation No. 3, 10 F. R. 4241.

petitioner elected to do—use its inventories as of the end of its last regular inventory period as the basis for the establishment of a computed inventory by the use of petitioner's slaughter, purchase, and sales records coupled with specified conversion factors. Petitioner selected its September 28, 1946, inventories as the basis for its report upon Form DSC-118. In its complaint (paragraph VB 12, R. 13), petitioner alleged that "The actual meat inventory total of beef, veal and pork which Swift and Company had on hand at the close of business on October 14, 1946, is comparable to the meat inventory on hand at the close of business on September 28, 1946." Although petitioner has asserted in various subparagraphs of paragraph VC of its complaint (R. 15-16) the impossibility of establishing "accurate" inventories as of the close of business on October 14, 1946, petitioner has failed entirely even to suggest, much less to show, the significance of these vague assertions with respect to the formulas prescribed by Form DSC-118, either as to petitioner or to any significant group of the meat industry affected by Form DSC-118.

CONCLUSION

For the reasons set forth in the briefs in opposition to certiorari in No. 104, *Cudahy Packing Company* v. *Reconstruction Finance Corporation,* and No. 248, October Term 1948, *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation,* and the additional reasons stated above, it is respectfully submitted that the petition by Swift & Company should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

PAUL A. SWEENEY,
SIDNEY J. MACHTINGER,
Attorneys.

JULY, 1951.

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